Supreme Court, U.S.
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(2)

No. 99-799

IN THE

Supreme Court of the United States

VALERIE WASHINGTON,

Petitioner,

v.

HEALTH COST CONTROLS OF ILLINOIS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately shows the parties to the proceeding. Respondent Health Cost Controls of Illinois, Inc. ("HCC") is a wholly-owned subsidiary of Primax Recoveries, Inc., a closely held corporation.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Cited Authorities	iii
Opinions Below	1
Statement of the Case	1
Reasons for Denying the Writ	5
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 941 F.2d 561 (7th Cir. 1991) 9

Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) 12

Car Carriers, Inc. v. Ford Motor Co., 583 F. Supp. 221 (N.D. Ill. 1984), *aff'd*, 789 F.2d 589 (7th Cir. 1986) 12

Chapman v. Klemick, 3 F.3d 1508 (11th Cir. 1993) 7, 8, 9

DACO v. Oriental Federal Savings, 648 F. Supp. 1194 (D.P.R. 1986) 11

FMC Medical Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997) 9, 10

Greenleaf v. Garlock, Inc., 174 F.3d. 352 (3d Cir. 1999) 12

New Orleans Public Serv. v. Majoue, 802 F.2d 166 (5th Cir. 1986) 11

Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988) 7, 8, 9

Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975), *aff'd*, 430 U.S. 519 (1977) 11

Cited Authorities

	Page
Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280 (7th Cir. 1993)	12
Winters v. Diamond Shamrock Chemical Co., 149 F.3d 387 (5th Cir. 1998)	12
Yeseta v. Baima, 837 F.2d 380 (9th Cir. 1988)	9
Statutes:	
735 ILCS 5/2-619(a)(3)	5
735 ILCS 5/2-619(a)(9)	4
28 U.S.C. § 1447	1, 4
28 U.S.C. § 1447(c)	11
28 U.S.C. § 2283	4
29 U.S.C. § 1001 *et seq.*	5
29 U.S.C. § 1002(21)(A)(i)	7
29 U.S.C. § 1002(21)(A)(ii)	7
29 U.S.C. § 1132(a)	11
29 U.S.C. § 1132(a)(3)	5, 9, 10
29 U.S.C. § 1144(a)	4

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 12(b)(1) 1, 4, 7

Fed. R. Civ. P. 12(b)(6) 9

Illinois Supreme Court Rule 308 4

Other Authority:

29 C.F.R. § 2509.75-5 9

OPINIONS BELOW

Petitioner Valerie Washington ("Washington") has neglected to refer the Court to two memorandum opinions and orders issued by the district court prior to entry of judgment. On May 7, 1996, the district court issued a memorandum opinion and order which denied in pertinent part Washington's motion to dismiss HCC's complaint on grounds that: 1) HCC's complaint failed to state a claim upon which relief could be granted; 2) HCC's claims were precluded by the doctrine of *res judicata*; 3) 28 U.S.C. § 1447 barred HCC's complaint, which was alleged to be an impermissible attempt to obtain review of the order of remand of the state case; and 4) the "Colorado River doctrine" barred the prosecution of HCC's complaint. *Health Cost Controls of Illinois, Inc. v. Washington*, 1996 U.S. Dist. LEXIS 6415 (N.D. Ill. May 7, 1996). On August 6, 1997, the district court issued a memorandum opinion and order which denied Washington's Rule 12(b)(1) motion to dismiss for want of subject matter jurisdiction. *Health Cost Controls of Illinois, Inc. v. Washington*, 1997 U.S. Dist. LEXIS 11762 (N.D. Ill. Aug. 6, 1997).

STATEMENT OF THE CASE

1. On May 25, 1989, Valerie Washington sustained injuries in a motor vehicle accident caused by the negligence of an uninsured third party motorist (the "accident"). Valerie Washington was at the time of the accident and at material times thereafter an employee of the University of Chicago, and a participant in a health care plan that it sponsored and maintained for the purpose of providing its employees and their eligible dependents with medical, surgical, hospital and other health benefits (the "Plan"). The Plan had a managed

care option which was provided by Michael Reese Health Plan, Inc. ("MRHP") through March, 1991.

2. The managed care option of the Plan contained the following reimbursement provision, as described in the Michael Reese Subscriber's Service Agreement:

> Medical services for injury caused by a third party are provided to a beneficiary. However, MRHP has the right to be reimbursed for the value of the services it has provided when a beneficiary receives payment from a third party. The beneficiary is required to cooperate with MRHP in regard to such injuries and payments.

3. Washington received benefits under the managed care option of the Plan for treatment of the injuries she sustained in the accident, the sum and value of which was $10,580.15.

4. In March of 1991 Humana Health Plan, Inc. ("Humana") purchased substantially all of the operating assets of MRHP, including MRHP's interest in the reimbursement claim which is the subject of this case, and thereafter the managed care option of the Plan was provided by Humana.

5. HCC was assigned the Plan's rights and claims to reimbursement for purposes of prosecution and collection.

6. On or about May 11, 1994, Washington received a monetary award for the injuries she sustained in the accident through payment of $60,000.00 made by Allstate Insurance Company ("Allstate"), Washington's uninsured motorist carrier, after an arbitration proceeding. Allstate issued two

checks in satisfaction of the aforesaid arbitration award in the aggregate amount of $60,000.00. One check was made payable to Valerie Washington and her attorneys in the amount of $49,419.85, and a second check was made payable to Valerie Washington, her attorneys and HCC in the amount of $10,580.15. When Washington contested the right of the Plan to be reimbursed the benefits it had previously extended, the second check in the amount of $10,580.15 was negotiated and the funds were deposited by Washington's counsel in a trust account pending resolution of the parties' dispute.

7. On or about September 8, 1994, Washington filed suit for declaratory, class action and other relief in the Circuit Court of Cook County, Illinois against Humana Health Plan, Inc., Michael Reese Health Plan, Inc., Health Cost Controls of Illinois, Inc. and Health Cost Controls of America, Inc., No. 94 CH 8133 (hereinafter the "state case"). The state case was timely removed by the defendants to the United States District Court for the Northern District of Illinois. Washington subsequently requested remand of the case based upon an alleged absence of federal subject matter jurisdiction. Washington's motion was allowed by the district court. *Washington v. Human Health Plan, Inc.*, 883 F. Supp. 264 (N.D. Ill. 1995) (App. 56a).

8. Following remand of the state case, the instant case was filed by HCC in the United States District Court for the Northern District of Illinois. HCC in count I of its complaint sought restitution, imposition of a constructive trust over the funds in dispute, declaratory and other equitable relief. Count II of the complaint sought to enjoin prosecution by Washington of the state case.

9. Washington initially moved for dismissal of this case on the grounds that: 1) HCC's complaint failed to state a

claim upon which relief could be granted; 2) HCC's claims were precluded by the doctrine of *res judicata*; 3) 28 U.S.C. § 1447 barred HCC's complaint, which was alleged to be an impermissible attempt to obtain review of the order of remand of the state case; 4) the "Colorado River doctrine" barred the prosecution of HCC'c complaint; and 5) count II of HCC's complaint was barred by the Anti-Injunction Act, 28 U.S.C. § 2283. The district court found that count II of HCC's complaint should be dismissed, and otherwise denied Washington's motion to dismiss in a memorandum opinion and order dated August 6, 1996. *Health Cost Controls of Illinois, Inc. v. Washington*, 1996 U.S. Dist. LEXIS 6415.

10. Washington next moved the district court to dismiss this case for want of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), which motion was denied by memorandum opinion and order dated August 6, 1997. *Health Cost Controls of Illinois, Inc. v. Washington*, 1997 U.S. Dist. LEXIS 11762.

11. During the pendency of these proceedings in the federal court, Washington continued to prosecute the state case. On January 9, 1996, the Circuit Court of Cook County denied a motion to dismiss Washington's complaint on grounds of ERISA preemption brought pursuant to 735 ILCS 5/2-619(a)(9), and certified that issue for interlocutory appeal pursuant to Illinois Supreme Court Rule 308. The Appellate Court of Illinois, First Judicial District, accepted the interlocutory appeal on January 21, 1997, and determined after review that Washington's pleaded claims in the state case were not preempted by Section 544(a) of ERISA, 29 U.S.C. § 1144(a). *Washington v. Humana Health Plan, Inc.*, No. 1-96-0770 (1st Dist. 1997), App. 44a. After the Illinois Supreme Court denied leave to appeal the decision

of the Appellate Court of Illinois, *Washington v. Humana Health Plan, Inc.*, 177 Ill. 2d 587, 698 N.E.2d 549 (1998), a motion to dismiss pursuant to 735 ILCS 5/2-619(a)(3) was filed in the Circuit Court of Cook County urging dismissal of the state case on grounds that there was another action pending between the parties. That motion was allowed and the state case was dismissed by a final order of the Circuit Court of Cook County entered on June 24, 1998. Washington has appealed from that order of dismissal, and her appeal, docketed as No. 98-2890, is pending in the Appellate Court of Illinois, First Judicial District.

12. On August 7, 1998, the district court issued an opinion in which it granted summary judgment in favor of HCC and denied Washington's cross-motion for summary judgment. Washington appealed from the entry of judgment, and the United States Court of Appeals for the Seventh Circuit affirmed.

REASONS FOR DENYING THE WRIT

Washington suggests in her petition for writ of certiorari that there are three reasons why review by this Court should be granted: 1) the United States Court of Appeals for the Seventh Circuit incorrectly concluded HCC was a fiduciary within the meaning and intendments of Section 3(21)(A) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*; 2) the action by HCC seeking the remedy of a constructive trust concerning a disputed fund of money was not one for "appropriate equitable relief" authorized by Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3); and 3) the courts below were precluded by the doctrine of *res judicata* from finding that there was federal jurisdiction over HCC's pleaded claim. None of these less than cogent arguments present a

compelling case for review by writ of certiorari, and Petitioner's attempts to clothe her arguments in the garb of a supposed conflict between the Seventh, Ninth and Eleventh Circuits is contrary to a fair reading of the reported cases upon which she relies.

1. Washington essentially argues that the lower courts erred in concluding that HCC was an ERISA fiduciary on the basis of a written assignment that delegated to HCC certain functions concerning the identification and collection of claims of reimbursement inuring in favor of her health benefit plan. Left unmentioned in her petition, however, are the unrebutted affidavits and declarations that were submitted by HCC in support of its motion for summary judgment to establish its status as an ERISA fiduciary, including the affidavit of Barry Averill, the former president of MRHP and a vice president of Humana. *Health Cost Controls of Illinois, Inc. v. Washington*, 1997 U.S. Dist. LEXIS 11762 *13-*19. The Averill affidavit stated, in pertinent part, that under a May, 1989 agreement between MRHP and HCC, "HCC agreed to identify, pursue and collect claims for health benefit reimbursement" and "was given the sole discretion and authority to settle any and all claims . . . ." Averill Affidavit ¶ 3. The Averill affidavit also established that:

> HCC has exercised its discretion in pursuing and settling many claims referred to it by MRHP and Humana for reimbursement of managed care services provided to various participants of health benefit plans sponsored by private employers, including the University of Chicago. HCC has previously remitted to MRHP and Humana on a monthly basis certain amounts which it has collected on MRHP/Humana claims for

> reimbursement of managed care services provided to various participants of health benefit plans sponsored by private employers.

Averill Affidavit ¶ 5.

The issue of HCC's fiduciary status is not whether "the act of receiving an assignment . . . qualifies as an exercise of discretion in the management or administration of the plan," Pet. 6, but instead is whether HCC established in the district court that it "exercises any discretionary authority or discretionary control respecting management of [the ERISA] plan or exercises any authority or control respecting management or disposition of its assets" or "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A)(i), (ii). In its memorandum opinion dated August 6, 1997, denying Washington's motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(1), the district court determined on the basis of HCC's unrebutted affidavits that, "Because HCC performs an administrative activity of the plan and has discretionary control over that activity, HCC is a fiduciary of the plan under 29 U.S.C. § 1002(21)(A)." 1997 U.S. Dist. LEXIS 11762 at *19. Washington fails to assign any error to this conclusion, no doubt because its logic is inescapable.

Nor is Washington any more successful in attempting to argue that the "Seventh Circuit's decision in this case is at odds with the decision of the Eleventh Circuit in *Chapman v. Klemick*, 3 F.3d 1508 (11th Cir. 1993), and with the decision of the Ninth Circuit in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988)." Pet. 6. Neither *Chapman* nor *Nieto* involve facts similar to those found in the case at bar, and their holdings

are not inconsistent with the rulings of the courts below. *Chapman* concerned the important policy question of whether an attorney should be burdened by operation of ERISA with conflicting duties owed both to his client as well as an ERISA plan. The Eleventh Circuit resolved this issue in holding that:

> The district court in this case put Klemick [the attorney] in the untenable position of owing conflicting fiduciary duties to both his client, Wilson, and to the Trust Fund. We do not think that Congress intended ERISA to extend that far. As one widely-cited authority has said:
>
> > No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.
>
> Matthew 6:24 (King James). A trust fund is not exactly "mammon," but an attorney's duty of loyalty to his client is very nearly sacred.

Chapman, 3 F.3d at 1511.

Nieto does not provide any aid to Washington because it involved a dissimilar claim for breach of fiduciary duty against an attorney, retained by trustees of ERISA-governed trust funds, who allegedly failed to prosecute lawsuits to collect delinquent contributions from employers. The complaint did not allege that the attorney exercised any authority over the trust funds in a manner other than by the usual professional functions of an attorney. In affirming the

Rule 12(b)(6) dismissal of the claim against the attorney, the Ninth Circuit relied on its prior opinion in *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988) as well as 29 C.F.R. § 2509.75-5 and concluded that there was "no basis for expanding the meaning of fiduciary" to include individuals who never contemplated accepting fiduciary status under ERISA. 845 F.2d at 870. This distinction was aptly noted by Judge Posner in his appellate opinion. App. 8a ("lawyers and other professionals who render services to the plan's administrator do not exercise 'any decision-making authority over the plan or plan assets; the power to act for the plan is essential to status as a fiduciary under ERISA,' " (quoting *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 570 (7th Cir. 1991)). Unlike the attorneys in *Chapman* and *Nieto*, HCC did knowingly and intentionally exercise "decision-making authority" over Washington's health plan and its assets.

The Seventh Circuit, far from confronting a supposed split of authority between the Circuits as suggested by Washington, correctly concluded that HCC "has considerably more discretion than the plan's lawyer, and this argues for making Health Cost a fiduciary on some other basis, namely ERISA." App. 8a. Cases such as *Chapman* and *Nieto*, which only concern the lack of an attorney's duty to a health plan under ERISA, are for this reason not "at odds" with the Seventh Circuit's decision below.

2. Washington does not argue in her petition that Section 502(a)(3) of ERISA precludes the imposition of a constructive trust, but instead contends that the Seventh Circuit's use of the remedy is in conflict with the Ninth Circuit's opinion in *FMC Medical Plan v. Owens*, 122 F.3d

1258 (9th Cir. 1997). No such conflict is presented by *FMC* because the Ninth Circuit in its opinion acknowledged that "FMC's claim is not in the nature of a constructive trust, nor has it pleaded a claim seeking such relief." 122 F.3d at 1261. Standing in stark contrast to *FMC* is the unambiguous request by HCC in the instant case for imposition of a "constructive trust as an alternative basis to restitution for its claim." App. 10a. This distinction demonstrates that the Ninth Circuit's opinion in *FMC* and the Seventh Circuit's opinion in the instant case can be reconciled, contrary to Washington's contention.

Even if the language of the two opinions were found to be inconsistent, the language in *FMC* concerning the availability of a constructive trust as a remedy under Section 502(a)(3) of ERISA would have to be considered dicta under its peculiar set of facts because *FMC* did not involve a dispute over an escrow or other identified funds. It instead concerned a request for "equitable reimbursement" from a plan participant. *FMC*, 122 F.3d at 1259. In the absence of a dispute over an identified fund, there can be no reason or necessity for the imposition of a constructive trust as "appropriate equitable relief."

As *FMC* did not involve a dispute over an identifiable fund of money or a request for imposition of a constructive trust, it is distinguishable on its facts from the instant case. The distinctions between *FMC* and the instant case militate against Washington's request for review.

3. Washington contends that District Judge Lindberg's order of April 20, 1995 remanding her case back to state court was an adjudication on the merits of HCC's claims

that precluded the lower court from finding subject matter jurisdiction for HCC's complaint filed in the instant case. This argument was raised by Washington in her initial motion to dismiss and was overruled by the district court in its opinion and order dated May 7, 1996. *Health Cost Controls of Illinois, Inc. v. Washington*, 1996 U.S. Dist. LEXIS 6415 *17-*22.

District Judge Lindberg in his 1995 opinion and order determined only that the federal court lacked removal jurisdiction over *Washington*'s complaint filed in the state case. *Washington v. Humana Health Plan, Inc.*, 883 F. Supp. at 267-68 (App. 64a). Federal courts which have considered this question have uniformly held that a remand order under 28 U.S.C. § 1447(c) adjudicates only the question of whether federal court was a proper forum for the remanded case, and nothing else. *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1303 (9th Cir. 1975), *aff'd*, 430 U.S. 519 (1977) ("Since the district court did not make any decision with respect to the propriety of a federal forum for *Rath*'s claims, we cannot say that maintenance of Rath's claim in federal court works a circumvention of 28 U.S.C. § 1447(d)" (emphasis in original text)); *New Orleans Public Serv. v. Majoue*, 802 F.2d 166, 168 (5th Cir. 1986); *DACO v. Oriental Federal Savings*, 648 F. Supp. 1194, 1196-1197 (D.P.R. 1986). The district court in this case correctly determined that Judge Lindberg's order remanding Washington's state case back to the Circuit Court of Cook County was not a decision on the merits of any issue other than the removability of Washington's complaint. Since HCC never sought to relitigate in the district court the question of whether *Washington* had pleaded a claim in the state case that arose under Section 502(a) of ERISA, 29 U.S.C. § 1132(a), the

courts below properly found that Washington's defense of *res judicata* was without legal merit.[1]

Petitioner does not take issue with the Seventh Circuit's analysis that an unappealable remand order is not *res judicata*. App. 7a, citing *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282 (7th Cir. 1993); *Greenleaf v. Garlock, Inc.*, 174 F.3d. 352, 359-60 (3d Cir. 1999); *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 394-96 (5th Cir. 1998). Nor does she contend that the authorities relied upon by the Seventh Circuit require further scrutiny by this Court, or even that a new rule of law should be fashioned to address the issue she seeks to present. Washington instead only contends that the "decision of the Seventh Circuit in this case subjects every remand order to collateral attack, eviscerating the legislative policy of nonreviewability as well as the judicial policy of finality." Pet. 9. This contention substitutes hyperbole for legal analysis.

The remand order Washington seeks to protect from attack did not address the existence of federal subject matter

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1. The district court correctly justified its conclusion by noting that the dismissal of an action "for want of subject matter jurisdiction is not a decision on the merits and consequently res judicata will not bar a later suit." 1996 U.S. Dist. LEXIS 6415 at *9, citing *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1274 (7th Cir. 1983); *Car Carriers, Inc. v. Ford Motor Co.*, 583 F. Supp. 221, 223 (N.D. Ill. 1984), *aff'd*, 789 F.2d 589 (7th Cir. 1986). In the words of the *Bunker Ramo* court, a "dismissal other than one on the merits merely precludes relitigation of the issues decided." 713 F.2d at 1277. The precedents cited by the district court embody the same principles that must in the end be applied to the set of facts presented by this litigation.

jurisdiction over HCC's claims — it instead was confined to a determination of whether there was removal jurisdiction over Washington's pleaded claims. *See Washington v. Humana Health Plan, Inc.*, 883 F. Supp. at 267 (App. 64a). Nothing about HCC's subsequent suit collaterally attacked District Judge Lindberg's conclusion that the federal court lacked removal jurisdiction over Washington's declaratory judgment action. Nor was a collateral attack on District Judge Lindberg's remand order necessary in order for HCC to prevail on the claims it asserted in its original action. It is thus specious for Washington to contend that the order remanding her case back to state court has been subjected to collateral attack. Such faulty reasoning does not call for this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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